

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 NORFOLK SOUTHERN RAILWAY :
4 COMPANY, :
5 Petitioner :
6 v. : No. 02-1028
7 JAMES N. KIRBY, PTY LTD., :
8 DBA KIRBY ENGINEERING, AND :
9 ALLIANZ AUSTRALIA LIMITED. :
10 - - - - -X
11 Washington, D.C.
12 Wednesday, October 6, 2004
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:02 a.m.
16 APPEARANCES:
17 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
18 the Petitioner.
19 THOMAS G. HUNGAR, ESQ., Deputy Solicitor General,
20 Department of Justice, Washington, D.C.; on behalf of
21 the United States, as amicus curiae, supporting the
22 Petitioner.
23 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of
24 the Respondents.
25

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 02-1028, the Norfolk Southern Railway Company
5 v. James N. Kirby.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONER

9 MR. PHILLIPS: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 My inclination is to start with the question
12 that the Court asked for supplemental briefing on on
13 Monday and analyze the question of which law applies,
14 Federal or State law, and then examine the issue of why
15 the judgment of the court of appeals should be reversed.

16 JUSTICE O'CONNOR: Mr. Phillips, I'm glad you're
17 doing that. This is a suit, a diversity suit, between an
18 Australian entity and a Virginia company about a rail
19 accident on land, and why do you think Federal law
20 applies?

21 MR. PHILLIPS: Well, the primary reason under
22 -- with respect to the Hamburg Sud bill of lading is
23 that that is incorporated into a tariff that's filed with
24 the Federal Maritime Commission under the Shipping Act of
25 1984, and it's long been settled that the interpretation

1 of tariff and obligations arising out of tariff filings
2 are questions of Federal law. So, therefore, in deciding
3 what the bill of lading by the ocean carrier -- what
4 effect it has in terms of binding the actual owner of the
5 property in operating through a freight forwarder, that
6 would be a question of Federal law, Justice O'Connor.

7 JUSTICE O'CONNOR: Was -- was the question
8 waived by the respondent below? How -- how did you all
9 proceed on this assumption?

10 MR. PHILLIPS: Well, we -- the parties clearly
11 litigated this issue from -- essentially from day one as a
12 question of Federal law, and I think you could, in fact,
13 simply accept that as the case comes to the Court without
14 resolving the question of whether Federal or State law --

15 CHIEF JUSTICE REHNQUIST: Well, the difficulty
16 with that was we would be deciding a highly hypothetical
17 case without knowing that Federal law governed.

18 MR. PHILLIPS: Well, it's -- it's not as
19 hypothetical as it might be in some contexts because it's
20 absolutely clear that there are going to be lots of
21 instances in which ocean-based carriers are going to be
22 issuing bills of lading and which -- and which the
23 responsibilities or duties that arise out of those bills
24 of lading, as they apply against the actual owner in
25 operating against the freight forwarder, are going to

1 arise, and there's not going to be any serious question in
2 that context. It's purely a matter of Federal law.

3 JUSTICE KENNEDY: I -- I want you -- I think the
4 whole bench wants you -- to talk about State versus
5 Federal, but as just one preliminary question -- I don't
6 mean to -- if it's State law, do we know what the answer
7 is? We don't seem to know the answer under Federal law.
8 Do we know the answer under --

9 MR. PHILLIPS: Well, I'm quite sure --

10 JUSTICE KENNEDY: -- Alabama law applies. Is it
11 then clear that one side or the other prevails?

12 MR. PHILLIPS: No, it's not clear at all.
13 There's no argument ever been made by the respondents.

14 JUSTICE KENNEDY: I was afraid that would be
15 your answer.

16 MR. PHILLIPS: I apologize.

17 I do think it is quite clear that if you were
18 looking at the ICC bill of lading and you only looked at
19 State law or any other law that the -- the ultimate
20 conclusion is inescapable because the language of that
21 contract says that these conditions, the limits on
22 liability, apply whenever claims are made against any
23 other person, including any independent contractors, whose
24 services have been used in order to perform the contract.
25 That's at joint appendix page 93.

1 That -- that language is so absolutely crystal
2 clear and it arises in the context of a through bill of
3 lading, which made it absolutely clear to Kirby, as the
4 owner of the goods, that this property was going to be
5 shipped overland that there is no way to interpret that
6 language under State, Federal, Australian, or anybody
7 else's law as not extending to this situation except
8 because of the rather peculiar interpretation the Eleventh
9 Circuit adopted based on this Court's decision in Robert
10 N. Herd. And I think if you recognize that the Herd
11 decision is not meant either to create a magic words
12 exception or to otherwise impose extraordinary obligations
13 on parties who enter into contracts, and that in fact what
14 we're looking for is what was the parties' intent as
15 measured by the language of the agreement, I would suggest
16 to you that under Federal or State law, it is absolutely
17 clear that the ICC bill of lading has to be interpreted to
18 extend to --

19 JUSTICE KENNEDY: What about the question of
20 Federal -- Federal or State law?

21 MR. PHILLIPS: Well, I -- I think that on the
22 Hamburg Sud bill, again the easy way to answer that is
23 it's incorporated into a tariff, and if it's incorporated
24 into a tariff, that means it's a question of Federal law.

25 JUSTICE STEVENS: But it is not necessarily true

1 that the law that applies to the second bill of lading
2 also applies to the first.

3 MR. PHILLIPS: It wouldn't necessarily be the
4 same. I think in -- in this context it makes sense that
5 they both ought to be resolved as a matter of Federal law.
6 But --

7 JUSTICE SOUTER: Well, is --

8 MR. PHILLIPS: -- but it's absolutely clear that
9 the first bill of lading ought to be interpreted as a
10 matter of Federal law.

11 JUSTICE SOUTER: Is -- is your argument that if
12 you don't interpret the second one under Federal law,
13 you're, in effect, going to undercut the significance or
14 the -- the efficacy of Federal law in interpreting the --
15 the first, the -- the Hamburg Sud?

16 MR. PHILLIPS: I don't think it necessarily
17 undermines the efficacy of the -- of the Federal
18 uniformity of the Hamburg Sud bill because if you enforce
19 that one, then the second one in some respects becomes
20 irrelevant.

21 JUSTICE SOUTER: Yes. But I mean --

22 MR. PHILLIPS: But -- but I do think it -- it
23 interferes with --

24 JUSTICE SOUTER: -- the amounts might be different
25 in another case.

1 MR. PHILLIPS: It might be different in another
2 case, and I do think it obviously interferes with the kind
3 of uniformity you would ordinarily expect when you're
4 dealing with essentially maritime commerce.

5 JUSTICE GINSBURG: Mr. Phillips, I hope maybe
6 you make -- you're going to make this point later, but it
7 seems to me it's very important which contract controls
8 because the Government has made an argument, as you know,
9 that the COGSA limit, the \$500 per package, would not
10 apply under the ICC contract, that the number there would
11 be \$450,000. It's -- so I hope you will explain to us why
12 -- if you think that the Government is wrong, why they are
13 wrong in saying if it's the ICC contract with Kirby, then
14 the appropriate limit is not COGSA but the \$450,000.

15 MR. PHILLIPS: I want to be clear that obviously
16 in our view the -- there's no question about the Hamburg
17 Sud bill. That one has a \$500 COGSA limit. It's embodied
18 in there. There's no dispute about that. So, again, to
19 the extent the Court decides this case on the basis of the
20 Hamburg Sud bill, there's no question that you have to
21 worry about the meaning of the ICC bill.

22 With respect to the meaning of the ICC bill, I
23 think the United States is correct that you can certainly
24 read that contract as -- as including a higher limit. The
25 problem, of course, is that was not the way the case was

1 litigated in the district court and it was not the way the
2 case was litigated in order to obtain interlocutory review
3 in the court of appeals. The parties specifically
4 stipulated to the court of appeals that the way this case
5 would be resolved most rapidly was by immediate review
6 because the amount in controversy would be the \$500 COGSA
7 limit. So I think there is a very strong argument,
8 Justice Ginsburg, that that issue has been waived by the
9 respondents prior to the time it got to this Court.

10 JUSTICE BREYER: So what's your view of that?
11 Because if you're right on that ICC bill of lading and the
12 limit is the same, we don't have to reach the other
13 question, which I think is much harder.

14 MR. PHILLIPS: There's no question that that --

15 JUSTICE BREYER: All right. So what are we --
16 what are we supposed to do? What do I look up to find out
17 whether you're right about this and we don't have to reach
18 the other question?

19 MR. PHILLIPS: Well, in the -- in the appendix
20 to the petition, you'll find both the district court and
21 the court of appeals orders granting interlocutory review,
22 and they are very explicit in identifying the \$500 COGSA
23 limit as the justification by which the parties decided to
24 take the case on an interlocutory basis. Having obtained
25 a benefit by making a representation to the court of

1 appeals, I think there's a -- that the Court, this Court,
2 ought to say they are estopped to -- to argue another
3 limit at this point.

4 Indeed, in our -- in our petition, we argue
5 explicitly for the \$500 COGSA limit because we took that
6 straight from the district court's own treatment of this
7 issue, and the respondents, in their opposition to the
8 petition for certiorari, did not assert anything to the
9 contrary. So I would argue, under this Court's prior
10 decisions, that the issue is waived at that score as well.

11 So it seems to me the -- the more sensible way
12 -- and -- and I agree with you, the somewhat cleaner and
13 easier way for this Court to resolve this case, is to
14 recognize that the plain language of the ICC bill of
15 lading unquestionably extends here, that the parties have
16 litigated this case on the assumption that that's a
17 question of Federal law, and that the parties have
18 litigated this case on the assumption that the COGSA limit
19 of \$500 per container applies to this particular case.

20 That said --

21 CHIEF JUSTICE REHNQUIST: But now, for instance,
22 we -- we do not accept stipulations on questions of law.
23 We accept stipulations on questions of fact. You're
24 saying it was litigated on the assumption of -- isn't that
25 pretty much like a stipulation?

1 MR. PHILLIPS: Are you talking about on -- on
2 the question of whether Federal law --

3 CHIEF JUSTICE REHNQUIST: Yes.

4 MR. PHILLIPS: -- or State applies?

5 I mean, I don't know that it was a -- I mean, it
6 wasn't a stipulation that Federal law applies. It was a
7 stipulation in order to obtain interlocutory review as to
8 the \$500 limitation -- cargo limitation. So that -- that
9 strikes me as a somewhat different issue for the Court to
10 resolve. And it's not the issue that's been posed for
11 this Court to decide in any event.

12 It seems to me at a minimum if you simply accept
13 the case as having come to you with the understanding of a
14 \$500 limit and reverse on the basis of either of the other
15 two -- on the basis on the two court of appeals' errors,
16 either one of them, and the case goes back to the lower
17 courts, they can fight over the question of whether or not
18 that issue has -- has been properly preserved. But I
19 think the answer is clearly that it has not.

20 Now, that said, while I agree with Justice
21 Breyer's assessment that in some respects the ICC bill of
22 lading is potentially a simpler way of resolving the case,
23 I also believe, frankly, that the Hamburg Sud bill of
24 lading is in some ways a more important basis on which the
25 Court ought to decide this question. The -- the issue of

1 what effect an ocean carrier's bill of lading has on the
2 conduct of the -- of the owner of the property is an issue
3 that, as a matter of common carriage law, this Court has
4 resolved since before the Civil War. And the clearest
5 case in which to my -- from my perspective is the Great
6 Northern opinion where the -- where this Court
7 specifically said that the owner of the goods who operates
8 through a freight forwarder is bound by the bill of lading
9 issued by the railroad whether as a -- an agent or as a
10 freight forwarder.

11 CHIEF JUSTICE REHNQUIST: That was before Erie
12 against Tompkins.

13 MR. PHILLIPS: Well, I understand that, and --
14 and all I'm saying is what is the Federal rule. And what
15 this Court said as a matter of what is the Federal rule is
16 that you don't apply strictly agency principles when
17 you're dealing in the area of common carrier relationships
18 and liabilities.

19 And again, remember, from my perspective, the
20 easiest way for this Court to reach the -- this question
21 as a matter of Federal law is because this is embodied in
22 a tariff, and the filed rate doctrine has long recognized
23 that when you're enforcing the rights and obligations
24 arising out of a tariff, it's a question of Federal law.

25 So the real issue, Mr. Chief Justice, is what is

1 the rule of law that should be applied in this context.
2 This Court announced that rule of law in Great Northern.
3 It actually announced it before the Civil War in York. It
4 had announced it again in Acme Fast Freight. And it has
5 consistently held, as a matter of carrier relationships
6 and as a matter of an efficient method of moving goods in
7 interstate and international commerce, that you must hold
8 the owner of the goods strictly to the -- to the tariff
9 arrangements in the bill of lading when -- with or without
10 the use of a freight forwarder.

11 JUSTICE SOUTER: Now, what is the significance,
12 if any, of COGSA in -- in your analysis in coming to that
13 conclusion? You're talking about pre-COGSA cases.

14 MR. PHILLIPS: I don't think COGSA directly
15 affects that particular analysis other than by enforcing
16 the bill of lading. That is the only mechanism by which
17 you get COGSA incorporated into the international scheme.

18 JUSTICE SOUTER: If you didn't have the prior
19 cases, what would the significance of COGSA be?

20 MR. PHILLIPS: Well, COGSA says that there are
21 \$500 limits on the bill of lading, but it doesn't
22 necessarily tell you the question of what's the
23 relationship between the owner or the freight forwarder
24 and the -- and the ocean carrier in this particular case.

25 JUSTICE SOUTER: What is -- what is the efficacy

1 of the COGSA limit if -- if in fact the -- the tariff is
2 -- the bill of lading is not enforced as a matter of
3 Federal law?

4 MR. PHILLIPS: Then COGSA has no role at all,
5 which is why it's very important, if COGSA is to have a
6 meaningful --

7 JUSTICE SOUTER: That's -- that's what I was
8 trying to get at. I mean --

9 MR. PHILLIPS: I was trying to get there too.

10 JUSTICE SOUTER: Yes, okay.

11 MR. PHILLIPS: But I was getting there pretty
12 slow. I apologize.

13 JUSTICE SCALIA: If I understand it, you'd say
14 COGSA doesn't give you the substantive answer, but COGSA
15 makes it a Federal question.

16 MR. PHILLIPS: COGSA, yes. That's one ground on
17 which you can get there as a Federal question. The
18 Shipping Act I think also makes a -- a Federal question,
19 and --

20 JUSTICE BREYER: Why is it?

21 MR. PHILLIPS: -- ultimately you'd say the
22 maritime statute makes --

23 JUSTICE BREYER: Why is it? Now, this is maybe
24 only me, but I don't think it is. What -- the basic
25 question, in my mind anyway, in respect to the Hamburg Sud

1 bill of lading is one I would have thought would have been
2 answered in the law clearly. I said the Supreme Court
3 cases aren't clear because they don't say what the theory
4 behind them is. I read all these amicus briefs. They
5 don't really seem to me to come to the point.

6 You have a shipper of some goods. He goes to an
7 independent freight forwarder who then enters into a
8 series of contracts. I don't care if they were ships or
9 trains or whatever. And something happens to the goods.
10 Maybe they weren't shipped. Maybe that independent
11 freight forwarder went bankrupt.

12 MR. PHILLIPS: Right.

13 JUSTICE BREYER: And the -- Mr. Shipper wants to
14 sue one of these carriers. Well, he didn't sign the
15 contract, and the person who signed it was an independent
16 freight forwarder, not wholly his agent. Okay. Can he do
17 it or not do it?

18 I have all about the law of France in one of
19 these briefs, except they just don't tell you the answer
20 to that question. They just don't tell you whether in
21 France, Sweden, or Finland or some other place, when the
22 shipper wants to go and sue one of those carriers, he can
23 recover. There's a -- there's a limit -- liability
24 limitation in the contract. The contract is enforceable.
25 There could be 100 situations where it comes up.

1 What's the answer? I'm amazed that that's never
2 been answered in 200,000 -- 2,000 years of people shipping
3 things. All right. So -- so why is this so unclear? Why
4 can't I get an answer? And I just can't find it.

5 MR. PHILLIPS: I think there are three theories
6 that have been put forward in the past. One I think is
7 embedded in this Court's decisions, in particular Great
8 Northern where the Court talks about business necessities,
9 and in York where the Court recognizes that the carrier
10 doesn't know the difference between a freight forwarder
11 and a shipper and it's unreasonable to allow the shipper
12 to get off the hook when the shipper chooses the freight
13 forwarder and can structure a better --

14 JUSTICE BREYER: I agree it's very unreasonable.
15 But even I can't say there's a general rule of law against
16 behaving unreasonably. So, therefore, I look for a
17 theory. What's the legal basis?

18 MR. PHILLIPS: Well, the legal basis is that
19 because the carrier is obliged to take the goods and
20 cannot discriminate, that he has no choice but to accept
21 the person, and that the courts are not going to impose an
22 obligation on him to look behind who shows up with the
23 goods in order to determine the rights or obligations of
24 the -- of the --

25 JUSTICE KENNEDY: Is that the first of your

1 three -- you said there are three -- three theories.

2 MR. PHILLIPS: Yes, that's the first of my three
3 theories.

4 JUSTICE KENNEDY: All right. And the second?

5 MR. PHILLIPS: The -- the second one is a
6 bailment theory, and we -- we spent a little bit of time
7 on that in the reply brief. But if you look at English
8 common law, English common law uses a combination of
9 bailment and sub-bailment to get to exactly the same
10 result where the owner of the goods is bound.

11 And then the final theory is one that comes out
12 of the Restatement of Agency, and it's the limited power
13 theory, that it's not a true agent. And I understand the
14 reason why there is some reluctance to call this a true
15 agency relationship because if you impose agency duties,
16 you may expose the owner to significantly more expansive
17 liability than he otherwise would have reasonably
18 undertaken, which is why this Court, I think, has wisely
19 -- and I think most of the courts have wisely -- said, no,
20 it's not a pure agency relationship. It's a common
21 carrier, bailment, limited power type of a relationship
22 which imposes you -- which allows you to go downstream
23 under your contracts. You can sue us under the contract,
24 but just as you can sue us pursuant to the contract,
25 you're also bound at the end of that process by the

1 liability limitations that are embedded in that same
2 agreement.

3 I think those are the three theories that lead
4 you to the right conclusion in this case.

5 JUSTICE GINSBURG: One -- one brief does take
6 quite a clear position on this. I don't know if it's
7 right or wrong, but respondents tell us that there's
8 nowhere in the world except Venezuela where the cargo
9 owner, Kirby here, would be bound by a bill of lading that
10 the ocean carrier issues to the -- a non-vessel-owning
11 common carrier.

12 MR. PHILLIPS: As I -- as I recall the way that
13 amicus brief reads, it's a little cagier than that because
14 it says of the law that we have evaluated in this brief,
15 nowhere else. And I'm telling you that, one, in UK it's
16 -- clearly the rule is to the opposite. And I don't
17 believe there was anything in there about Japanese law.

18 I mean, what's really missing in this case is
19 none of our trading partners came in here and argued that
20 this is a -- that there's a problem in the interpretation
21 that we've put forward. I would, frankly, dismiss out of
22 hand the position of the law professors.

23 JUSTICE STEVENS: May I ask you a question that
24 just troubles me as I read all the papers? Has ICC ever
25 been sued?

1 MR. PHILLIPS: Yes. ICC was sued in Australia.

2 JUSTICE STEVENS: It was sued in Australia.

3 MR. PHILLIPS: Yes, Your Honor.

4 JUSTICE STEVENS: And for the maximum -- what --

5 MR. PHILLIPS: It was settled, so I don't know.

6 JUSTICE STEVENS: Okay.

7 MR. PHILLIPS: I mean, they made the -- the full
8 claim.

9 If there are no further questions, I'd save the
10 rest of my time for rebuttal.

11 CHIEF JUSTICE REHNQUIST: Very well, Mr.
12 Phillips.

13 Mr. Hungar.

14 ORAL ARGUMENT OF THOMAS G. HUNGAR

15 ON BEHALF OF THE UNITED STATES

16 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

17 MR. HUNGAR: Mr. Chief Justice, and may it
18 please the Court:

19 Unless corrected by this Court, the erroneous
20 rules of law announced by the court of appeals will
21 produce substantial inefficiencies and frustrate
22 longstanding and important congressional policies in the
23 ocean transportation arena.

24 With respect to the question of Federal or State
25 law, Mr. Chief Justice, in response to your questions, it

1 would not be hypothetical or -- or an inappropriate
2 acceptance of a stipulation on a question of law to decide
3 this case on the basis of the parties' implicit agreement
4 that it is governed by Federal law because parties are
5 always permitted to -- to agree to choice of law, which is
6 all we would be talking about here. There's no
7 jurisdictional problem because jurisdiction is clearly
8 present.

9 CHIEF JUSTICE REHNQUIST: Yes, but I think we
10 would have some reservation about -- excuse me -- about
11 deciding a case where one of the principal points in issue
12 was simply assumed rather than decided.

13 MR. HUNGAR: Well, first of all, Your Honor,
14 with respect to the Hamburg Sud bill of lading, as we've
15 argued in our brief, that is unquestionably covered by
16 Federal law because of the application of the Shipping Act
17 and the tariff regime and the nondiscrimination principle
18 that requires enforcement of the terms of the bill of
19 lading, which is incorporated into the tariff.

20 But even with respect to the ICC bill of lading,
21 where parties have agreed on choice of laws, it's
22 appropriate for a court to accept that agreement, and it's
23 not hypothetical because it's unquestionable that there
24 will be many circumstances in which the very -- in which
25 the question presented here and the analysis of the court

1 of appeals will be implicated in purely maritime
2 context --

3 JUSTICE KENNEDY: Suppose there had been -- been
4 no agreement by the parties. What would your position be
5 as to the law that controls the construction of the ICC
6 Kirby contract?

7 MR. HUNGAR: Your Honor, that's an open
8 question, and we've argued in our supplemental brief that
9 it would be appropriate, if the Court felt it necessary to
10 address that question. We don't think it is necessary,
11 but if the Court felt it necessary to address that
12 question, we think it would be appropriate to conclude
13 that in the specific context we have here in a multimodal
14 bill of lading for transportation internationally by ship
15 and also by land carrier, where the clause in issue, the
16 Himalaya clause, is applicable, we submit, to both by its
17 terms, to both maritime players and land carriers, read in
18 accordance with its terms, where you're interpreting a
19 clause that has application clearly in the maritime as
20 well as the inland context, it is appropriate to apply the
21 established maritime rules of construction to that clause
22 because this is a maritime bill of lading and uniformity
23 in this area is extremely important. And this Court has
24 recognized that while the borders between the Federal
25 maritime law and State law are very unclear and it's a

1 flexible analysis where -- where uniformity is important,
2 Federal maritime law will govern.

3 CHIEF JUSTICE REHNQUIST: What -- what if the
4 overseas -- this maritime part of the shipping was 500
5 miles and the land part was 2,000 miles?

6 MR. HUNGAR: Well, we think it would be -- we
7 think it would be inappropriate to do a mileage analysis.
8 I mean, here the -- here obviously I think the -- the
9 mileage --

10 CHIEF JUSTICE REHNQUIST: Well, I'm asking you
11 to do a mileage analysis.

12 MR. HUNGAR: Well, we would submit that it -- it
13 would be inappropriate to adopt a rule in which the -- the
14 applicability of Federal law depends on the relative
15 mileage because that would create uncertainty and
16 confusion, although here, if one were to apply such a
17 rule, it would suggest application of Federal maritime
18 law, given the distance, more than 10,000 miles versus 366
19 miles.

20 CHIEF JUSTICE REHNQUIST: You're not talking of my
21 hypothetical, but about the facts of this case.

22 MR. HUNGAR: I'm sorry, Your Honor?

23 CHIEF JUSTICE REHNQUIST: I said, you're not
24 talking about the 500 miles ocean/2,000 miles land.
25 You're talking about the facts of the case we're arguing

1 now.

2 MR. HUNGAR: Yes, Your Honor. But in your
3 hypothetical, again I think that if this Court were to
4 agree with our submission that Federal law -- Federal
5 maritime law would govern if you have a through bill, an
6 intermodal bill of lading involving maritime
7 transportation in the international context, which would
8 be subject to maritime law, we think it would be
9 appropriate to apply maritime law in construing the Himalaya
10 clause. But again, the Court need not reach that
11 question.

12 We think if the Court does consider the
13 application of Federal law and Federal interpretative
14 principles to the ICC bill of lading, the answer is clear.
15 The -- the plain text of the bill of lading, of the
16 Himalaya clause --

17 JUSTICE STEVENS: Would you just clarify one
18 thing for me? Suppose in this case, instead of having a
19 through bill of lading from the sea all through the --
20 through the railroad, there had been a delivery at the
21 port to the freight forwarder or somebody else on behalf
22 of the shipper and then a new bill of lading was issued to
23 the railroad. Would the liability then be different for
24 the railroad?

25 MR. HUNGAR: Yes, it would because in that --

1 JUSTICE STEVENS: And then if -- would the rate
2 be different in that instance?

3 MR. HUNGAR: Well, it would be if it -- a
4 through rate -- by definition, if you have a through bill,
5 you have a through rate. It's one rate offered by the
6 ocean carrier that encompasses the whole --

7 JUSTICE STEVENS: I'm trying to find out whether
8 the railroad would have a different liability under my
9 hypothetical. I'm wonder if it would have charged a
10 different amount for the freight.

11 MR. HUNGAR: The record doesn't reveal that, but
12 -- but it would have been a different negotiation
13 obviously, subject to different terms, and it seems likely
14 that the rate would have been different. Whether higher
15 or lower is unclear but -- because in that circumstance,
16 the -- depending on the terms of the -- of the contract
17 between the -- the railroad and the shipper, it might have
18 been subject to the Carmack Amendment which provides a
19 different liability limitation regime --

20 JUSTICE STEVENS: Should we assume that the
21 railroad probably gave a special bargain to the shipper in
22 this case because it had a lesser exposure for liability?

23 MR. HUNGAR: Yes, that seems appropriate to
24 assume. Hamburg Sud is a major ocean carrier and Norfolk
25 Southern is a -- a major rail carrier. And it seems

1 appropriate to assume that in their negotiations, they
2 would address questions such as limitation of liability.
3 The -- the record here is clear. Both the district court
4 and the court of appeals said that Hamburg -- that -- that
5 Norfolk Southern carried under the terms of the Hamburg
6 Sud bill of lading, and it is reasonable to assume they
7 were relying on that, that --

8 JUSTICE STEVENS: But the record doesn't
9 actually tell us whether the rate was, in fact, different
10 than it otherwise would have been.

11 MR. HUNGAR: That's correct.

12 JUSTICE O'CONNOR: Mr. Hungar, the railroad
13 industry has been deregulated. As a result, I suppose the
14 nondiscrimination policy doesn't apply. It may end at the
15 water's edge. So how would there be any preemption?

16 MR. HUNGAR: Justice O'Connor, the railroad
17 industry has been deregulated, but the shipping industry
18 has not. And the tariff requirement specifically requires
19 an ocean carrier like Hamburg Sud to file its tariff and
20 its bill of lading for through routes covering the entire
21 through route that is the subject of the transportation
22 being offered and provided. So in that sense, it's true
23 that normally the nondiscrimination principle would not
24 apply, but in -- in the context of a through bill, which
25 this is, issued by an ocean shipper, an ocean carrier, the

1 nondiscrimination principle is applicable, and that's
2 under section 1707(a)(1) of the Shipping Act.

3 JUSTICE O'CONNOR: Thank you.

4 MR. HUNGAR: The tariff -- with respect to, Mr.
5 Chief Justice, your question about Great Northern, Great
6 Northern, although decided pre-Erie, is not a -- it was
7 not decided under diversity jurisdiction. It was a case
8 that came out of the Supreme Court of Minnesota. So Swift
9 v. Tyson would not have been applicable.

10 And more importantly, although the Court was
11 perhaps not as clear as we would have liked in explaining
12 the rationale for its holding, it's clear that it was
13 relying, at least in part, on Federal tariff regulations,
14 essentially the same as those at issue here. The Court
15 said -- and this is on page 515 of its opinion -- so long
16 as the tariff rate, based on value, remained operative, it
17 was binding upon the shipper and carrier alike and was to
18 be enforced by the courts in fixing the rights and
19 liabilities of the parties. And that's exactly what the
20 Court did in that case, and we submit that's exactly what
21 the Court should do in this case as well.

22 CHIEF JUSTICE REHNQUIST: And might not that
23 have been a matter of contract law?

24 MR. HUNGAR: No, Your Honor, because it's very
25 -- it's very clear that -- that tariff rates are

1 enforceable -- federally filed or federally published
2 tariff rates are enforceable as a matter of Federal law,
3 and liability limits are part of that, as this Court said
4 in precedents that the -- that are cited in the
5 petitioner's brief. And the -- that's a Federal law
6 question, not merely a question of State law, when there
7 is a Federal tariff regime in place.

8 JUSTICE BREYER: Is it clear that they're
9 applicable -- the tariff as a matter of law -- to a
10 shipper that hires an independent freight forwarder to
11 arrange for the shipment?

12 MR. HUNGAR: Well, that's exactly the facts in
13 Great Northern.

14 JUSTICE BREYER: Okay.

15 MR. HUNGAR: In Great Northern, the shipper
16 hired the Boyd Transfer Company to -- to ship the goods,
17 which in turn hired the railroad, and then the shipper
18 tried to sue the railroad, and the Court said you can't do
19 that and -- and clearly relied, at least in part, on the
20 tariff regime, as well as the -- the whole history of --
21 of the Federal common carrier law.

22 JUSTICE GINSBURG: Does it make any difference
23 that we have this division between freight forwarders who
24 act as agent for the cargo owner and the so-called NVOCC
25 that -- that act as principal vis-a-vis the ocean carrier?

1 MR. HUNGAR: No, Your Honor. The -- again, in
2 Great Northern, the Court was presented with that issue.
3 The -- the plaintiff in that case argued that the transfer
4 company was not its agent and therefore it wasn't bound.
5 They argued that in their brief in this Court, and this
6 Court essentially said it doesn't matter. Whether agent
7 or forwarder, the railroad there, the -- the carrier that
8 actually carried the goods is entitled to rely on its bill
9 of lading, its tariff as against in a suit brought by the
10 -- the shipper, the owner of the goods. That's -- that's
11 precisely the fact situation at issue here. The Court
12 felt it unnecessary to resolve the dispute about whether
13 the -- the forwarder in that context was an agent
14 forwarder or a full-fledged common carrier forwarder.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hungar.
16 Mr. Frederick, we'll hear from you.

17 ORAL ARGUMENT OF DAVID C. FREDERICK
18 ON BEHALF OF THE RESPONDENTS

19 MR. FREDERICK: Thank you, Mr. Chief Justice,
20 and may it please the Court:

21 I'd like to start at the beginning in this
22 litigation because the district court ruled erroneously,
23 on page 38a of the petition appendix, that the Hamburg Sud
24 bill of lading controlled and allowed Norfolk Southern to
25 limit its liability. The Hamburg Sud bill of lading is

1 the wrong bill of lading. So when we took an
2 interlocutory appeal -- and the reason it's the wrong bill
3 of lading is because Kirby was not a party to that bill of
4 lading. And our theory all along has been we are not
5 bound to the Hamburg Sud bill of lading. We weren't a
6 party to it, and ICC was not our agent for purposes of
7 entering into that bill.

8 We took an interlocutory appeal, saying the
9 district court was wrong. It applied the wrong bill of
10 lading. That bill of lading provides for the COGSA limit
11 of \$500. It shouldn't have applied that limit. It is
12 wrong as a matter of law.

13 Very importantly, when we filed a motion for
14 interlocutory appeal, we did not state that Federal
15 substantive law governs. That is nowhere in the
16 interlocutory appeal petition. We cited five cases, three
17 from the Second Circuit, two from the Ninth Circuit. Four
18 of those cases involved clearly the application of State
19 substantive law. They're contract interpretation cases in
20 which Federal courts --

21 JUSTICE O'CONNOR: Can you point to the record
22 anyplace where you took the position below that Federal
23 law could not and did not apply?

24 MR. FREDERICK: No, Your Honor. We -- the
25 parties never argued what substantive law applied.

1 JUSTICE O'CONNOR: Well, why shouldn't we just
2 say you both assumed it was going to be decided under
3 Federal law?

4 MR. FREDERICK: This Court would be making
5 precedent, Your Honor, on the basis of the wrong legal
6 theory for what substantive law controls. And this is a
7 very important point. The question --

8 JUSTICE O'CONNOR: Well, now, the parties
9 presumably could agree among themselves in the contract
10 what law to apply.

11 MR. FREDERICK: True, Your Honor, but that
12 isn't --

13 JUSTICE O'CONNOR: So is it a step to say they
14 can implicitly agree the same thing?

15 MR. FREDERICK: Well, that -- there's no
16 agreement here, and that's our point.

17 JUSTICE O'CONNOR: There's no objection.

18 MR. FREDERICK: We're objecting now.

19 JUSTICE O'CONNOR: Yes, but it's a little late.

20 MR. FREDERICK: It's not late, Your Honor,
21 because the -- the question here -- this is a diversity
22 case. And we brought a tort action, and under the normal
23 rules that have been applied ever since the -- the 1941
24 decision of this Court in Claxson is that you look to the
25 State law to be applied.

1 JUSTICE GINSBURG: Mr. Frederick, there are
2 diversity cases in which Federal maritime law has applied.

3 MR. FREDERICK: That's true.

4 JUSTICE GINSBURG: So it doesn't follow like the
5 night, the day, that because it's brought under the
6 heading of diversity, that therefore State law applies.

7 MR. FREDERICK: That's true, Justice Ginsburg,
8 and that's why it's important that you understand what
9 their theory is for applying Federal maritime law.

10 This Court's decision in Victory Carriers said,
11 you do not apply Federal maritime law until you establish
12 that there is admiralty jurisdiction. The Constitution,
13 article III, section 2 says the judicial power extends to
14 cases of admiralty jurisdiction. So you look first to
15 determine is there admiralty jurisdiction.

16 Now, there's no claim here that the tort, the
17 train derailment, is a maritime tort. That would be an
18 absurd argument. Their only argument is that the
19 multimodal through bill of lading, because it covers
20 partly ocean carriage, has to be a maritime contract.
21 That theory is wrong, and it's been rejected by virtually
22 every court that we've been able to find, including cases
23 that the Government cites in their brief on page 7.

24 What the courts have held is that with a mixed
25 contract that has part maritime and part non-maritime

1 obligations, the admiralty jurisdiction of the court is
2 defeated. And that is the uniform holding of all of the
3 cases. And -- and Judge Friendly in the Leathers Best
4 case in 1971 set this out very clearly, and what he said
5 was when you have a mixed contract, you cannot apply
6 admiralty jurisdiction under this Court's precedent in the
7 Eclipse case.

8 JUSTICE SOUTER: Where does that -- I mean, and
9 -- and assuming from that, that it follows that this isn't
10 Federal jurisdiction and so on -- Federal rule, where does
11 that leave the -- sort of the -- the carrier in the
12 middle? Is the carrier in the middle in a position to
13 know what the result will be on your analysis and
14 therefore in a position to know whether he can rely upon a
15 Federal rule or is taking his chances with respect to any
16 State rule that may apply because of a railroad at the end
17 of the -- the trip?

18 MR. FREDERICK: Justice Souter, our position is
19 that this is simply a matter of contract interpretation.
20 And the reason why Federal courts have not looked at the
21 State substantive versus Federal substantive law question
22 is they simply looked at the words in the contract.

23 JUSTICE SOUTER: Well, it's -- it's a matter of
24 contract interpretation, but the -- the significance for
25 -- for an understanding of the contract liability, which

1 the shipper in the middle is undertaking, may be enormous.
2 And my question I guess is, if we follow your rule and --
3 and we say that because the -- this isn't admiralty,
4 therefore there's no -- there's no Federal rule of
5 decision, where does that leave the -- the carrier in the
6 middle?

7 MR. FREDERICK: The carrier has uniformly been
8 -- the -- the issue is a question of contract
9 interpretation. What do the words mean? And the carrier
10 in all these cases imposes a limitation of liability in
11 the contract. And the question is one of interpretation
12 as to does that limitation apply.

13 We cited a number of cases, Justice Souter,
14 where it's clear that issue is decided as a matter of
15 State substantive law, even when the shipment starts in
16 Korea, but lands --

17 JUSTICE SOUTER: But -- but that's -- that's
18 not --

19 JUSTICE SCALIA: I'm not following.

20 JUSTICE SOUTER: No.

21 JUSTICE SCALIA: I'm not sure it's -- it's just
22 a matter of contract interpretation. The -- the contract
23 is clear that there's a limitation of liability. The
24 question is whether that limitation of liability applies
25 to someone who is not privy to the contract. That's --

1 that's not an issue of -- of contract interpretation.

2 MR. FREDERICK: Well, respectfully, yes, it is,
3 Justice Scalia, because you have to look at who was within
4 the clause.

5 But the way the courts have treated this, under
6 the mixed contract doctrine, which we set out in our
7 supplemental brief, is to look at whether the maritime
8 obligations are separable from the non-maritime
9 obligations, and where they are separable, then you would
10 apply the maritime law to that part of it, which is a
11 maritime obligation, here the sea carriage, and you would
12 apply non-maritime law to the inland carriage. And here
13 there's no question that a train derailment would be non-
14 maritime because it is -- involves a locus on the land and
15 not at sea.

16 Now, based on this Court's decisions and the
17 application of the mixed contract doctrine, you would be
18 deciding a question of State substantive law, which you
19 are clearly empowered to do. The question is, as a matter
20 of precedent, you should not assume that Federal maritime
21 law applies here because to do that would make the
22 multimodal industry subject to the Federal maritime law.
23 And that's what the Government has just suggested,
24 extending the Jenson line not just from the water's edge,
25 but inland. And --

1 JUSTICE O'CONNOR: But the Jenson line may make
2 real sense in -- in its application to intermodal bills of
3 lading like this which occur all the time. It seems so
4 strange that a carrier like Hamburg Sud would have to
5 spend a lot of time and money finding out if they're
6 contracting with an intermediary who has other contracts
7 or what's going on. I mean, these are things that happen
8 all the time, and I wonder if the Jenson line isn't the
9 correct line to look to.

10 MR. FREDERICK: Justice O'Connor, if Congress
11 makes that decision, that's certainly an appropriate thing
12 for discussion for legislation. Our submission is that
13 this Court, as a matter of judge-made law where the
14 parties have not litigated this until 10 days before the
15 oral argument, should not be deciding in this case to
16 doctrinally extend the Jenson line to a place where it has
17 never before existed.

18 JUSTICE BREYER: Why not? I mean, all over the
19 world, people ship with these bills of lading. The
20 shipper simply gets a piece of paper. It says it's a bill
21 of lading and it's going to be sent to anyone of 5 billion
22 destinations. Four billion of the 5 billion will involve
23 some little bit of inland travel. Now, if suddenly the
24 laws of 50 States were to apply to all those bill of
25 ladings, wouldn't it be an all-time mess?

1 MR. FREDERICK: No.

2 JUSTICE BREYER: Because?

3 MR. FREDERICK: Because most of them have choice
4 of law provisions that States respect and as did the ICC
5 bill of lading which applied for the country's law of
6 shipment to govern. That's in the last clause of the ICC
7 bill of lading. So most --

8 JUSTICE BREYER: Is there anything I can read
9 that would help me decide if it really would be a mess or
10 wouldn't be a mess?

11 MR. FREDERICK: Well, yes. I can point you to
12 several court of appeals decisions, and in particular, I
13 would point you to Judge Cabranes' decision in the
14 Hartford Insurance case, which we have cited. I would
15 cite you to Judge Diane Wood's opinion for the Seventh
16 Circuit just last year in the Insurance v. Hanjin Shipping
17 case. And importantly, I would point you to Judge
18 Friendly's seminal decision in Leathers Best, a decision
19 decided in 1971.

20 JUSTICE GINSBURG: If you're right, Mr.
21 Frederick, that it's State law that controls, then why
22 should we decide anything beyond that choice of law
23 question? Because if State law controls, then Louisiana
24 could do it one way, Mississippi could do it the other
25 way. Why should we be concerned what the substantive

1 answer would be if State law controls?

2 MR. FREDERICK: Well, the substantive answer, as
3 I think Norfolk Southern has basically conceded on the
4 agency point, there's no question that if -- if that is
5 decided as a matter of contract interpretation, we win.
6 They've never disputed that the words do not create an
7 agency.

8 JUSTICE GINSBURG: Mr. Frederick, if it's
9 contract determination under State law, why should this
10 Court be resolving the question, however clear it may be?

11 MR. FREDERICK: We submitted that the Court
12 should dismiss as improperly granted, Justice Ginsburg.
13 We've opposed certiorari. We've put -- used every line of
14 every brief that we've been able to submit in this case.
15 This is an interlocutory appeal of a tort brought in
16 diversity where there's a contract interpretation issue
17 raised as a defense. Our position all along has been that
18 this Court should not decide the case.

19 But if I could turn to the merits --

20 JUSTICE STEVENS: May I ask just one -- one last
21 question? Would your position be the same if the
22 defendant were a longshoreman rather than a railroad?

23 MR. FREDERICK: With respect to which question?

24 JUSTICE STEVENS: Assume the accident occurred
25 not in the shipment by rail carrier but unloading cargo at

1 the -- and the negligence was on the part of a stevedore.

2 MR. FREDERICK: Our position with respect to the
3 Hamburg Sud bill of lading stays the same, that the
4 Hamburg Sud bill of lading does not control for the same
5 agency reason that we set forth in our briefs. With
6 respect to the Himalaya clause issue, which I'm assuming
7 you're asking about --

8 JUSTICE STEVENS: Well, and also whether it's a
9 matter of State or Federal law too.

10 MR. FREDERICK: Well, I think Victory Carriers
11 answered the question. It would depend on how the
12 accident happened. If the -- if the -- and this is the
13 confusion that is raised in the cases that we cited to the
14 court of appeals. In one of them, a Ninth Circuit case,
15 the stevedore dropped the cargo in the hold of the vessel,
16 and that's the only maritime law case that we think would
17 be governed by substantive maritime law. All of the other
18 cases involved the stevedore committing a tort on land --

19 JUSTICE STEVENS: Right.

20 MR. FREDERICK: -- and therefore would fall on
21 the land side of the locus jurisdiction. So those are the
22 -- the three cases that we cited in our petition to the --
23 from the Second Circuit. One of them, the Scheiss case,
24 the Finlander, in footnote 2, makes it very clear there
25 that it was dealing with State law, and that's because the

1 stevedore there committed the tort on land.

2 JUSTICE O'CONNOR: Mr. Frederick, just as a
3 practical matter, why isn't the client satisfied with
4 suing ICC for damages, which I understand has -- has been
5 done?

6 MR. FREDERICK: Your Honor, the -- there was a
7 limitation of liability in the ICC bill of lading. And
8 Justice Breyer, it's set forth in clause 8.3 that two
9 special drawing rights per kilogram gross weight would be
10 applied. To translate that for you, that's the Hague-
11 Visby limits which dramatically increased the limits from
12 the Hague rules which Australia has adopted in its
13 Carriage of Goods by Sea Act. So --

14 JUSTICE O'CONNOR: Well, that doesn't answer my
15 question. I -- I understood that Kirby collected
16 insurance and sued ICC.

17 MR. FREDERICK: The insurer here, Justice
18 O'Connor, is the real party in interest because it
19 subrogated interests. It paid its insurance --

20 JUSTICE O'CONNOR: And it wants now to collect
21 money from Norfolk.

22 MR. FREDERICK: It wants to collect against the
23 wrong -- the -- the wrongdoer here, which is Norfolk
24 Southern.

25 And I want to point out that -- that there's

1 been this comment by the government, which is strange,
2 about efficiencies. If you look at the maritime cases
3 that are decided, a very high proportion of them are
4 brought by insurance companies to bring claims against
5 negligent wrongdoers. That's how you keep premiums down.
6 If a wrongdoer commits a tort --

7 JUSTICE BREYER: But I mean, the -- the
8 argument, which I'm really interested in your addressing,
9 is that overall, naturally any insurance company would
10 like to get the money if it could. But overall, a system
11 that's developed where the shippers buy first party
12 insurance and get their money if they're hurt and the
13 carriers all know their tort liability is limited in
14 contract liability is one that overall avoids lawyers,
15 avoids lawsuits, avoids tremendous expense, and has led to
16 lower rates and better service. Okay.

17 MR. FREDERICK: But that's not the system,
18 Justice Breyer, and that's important for you to
19 understand. That is not the system that we have because
20 we have insurance companies bringing subrogated claims all
21 the time against negligent wrongdoers, and they do that in
22 order to get recoveries for losses that they have to pay
23 out. That's --

24 JUSTICE BREYER: All right. If this happens all
25 the time -- if it happens all the time that the subrogated

1 insurer goes and sues someone down the line with whom the
2 shipper himself did not enter into a liability limiting
3 contract, why, after reading these briefs, do I feel I
4 can't find a case in point --

5 MR. FREDERICK: Hartford Insurance.

6 JUSTICE BREYER: -- but for, arguably, this old
7 case of the Supreme Court?

8 MR. FREDERICK: Read Hartford Insurance. Judge
9 Cabranes lays this all out.

10 JUSTICE BREYER: Hartford Insurance, okay.

11 MR. FREDERICK: And he explains it very clearly
12 why an insurance company would bring a subrogated claim,
13 and that claim would be decided by State substantive law,
14 notwithstanding --

15 JUSTICE BREYER: All right. So maybe that is
16 what's happened.

17 MR. FREDERICK: -- through bill of lading.

18 JUSTICE BREYER: Now, let me ask you. Is it
19 necessarily going to be true that if we agree with you and
20 shippers in general did want to have first party insurance
21 and did want to contract for these lower rates, et cetera,
22 you just couldn't create the system because carriers down
23 the line would look back and see that the independent
24 freight forwarder was the party in interest at the first
25 contract for transportation would have no idea whether,

1 behind that independent freight forwarder, there stood
2 another independent shipper or there did not, and thus
3 would not know whether his liability was really limited or
4 not, and therefore would have to charge a price that in
5 fact reflected a liability regime where he might have to
6 pay up?

7 MR. FREDERICK: Justice Breyer, the answer to
8 your question is reflected in the marketplace. The
9 insurance rates are going to be set on the basis of loss
10 recoveries with the idea of deterring negligent conduct.

11 JUSTICE BREYER: But I'm now taking your answer
12 to my question is your --

13 MR. FREDERICK: And --

14 JUSTICE BREYER: No, there is no way to do it --

15 MR. FREDERICK: I -- I haven't --

16 JUSTICE BREYER: -- if in fact -- all right. If
17 there is a way to do it, I want to find out.

18 MR. FREDERICK: The UNCITRAL process is
19 negotiating this very point, Justice Breyer. As we point
20 out in our brief in opposition to cert, it involves very
21 delicate compromises among a whole range of maritime and
22 non-maritime interested parties. We submit, as a matter
23 of common law, for this Court to drop in and make a
24 decision in this case would have only one small piece of
25 the puzzle that is being negotiated internationally to

1 deal with this kind of issue.

2 And our submission is the international parties
3 and the 12 professors that Mr. Phillips said should be
4 given no weight, as the amicus brief points, are virtually
5 all the representatives of their countries at these
6 UNCITRAL negotiations. And they're telling you that
7 international uniformity would be served by affirming the
8 Eleventh Circuit decision and -- and reflecting what
9 parties understand --

10 JUSTICE BREYER: The problem with the professors
11 was I thought not all, but most of the cases they cite,
12 they're citing for the proposition that the person, i.e.,
13 the independent freight forwarder, is indeed independent
14 and not the agent of the shipper. I -- I got that.

15 But what I wonder, of course, is whether that
16 fact translates in their law into the conclusion that
17 therefore the carrier ultimately is -- that he cannot
18 assert a liability limitation. That's the ultimate
19 question. And there were one or two that did seem to say
20 that, but most of them just didn't seem to talk about that
21 issue.

22 MR. FREDERICK: The two cases that I'm familiar
23 with, Justice Breyer, are from Japan and Korea, and the
24 Japan case actually deals with this bill of lading and
25 comes to exactly the same conclusion that we urge upon the

1 Court here. What the scholars have said, though, is that
2 because the shipper would not be bound by the non-vessel-
3 operating carrier's subsequent subcontract, that there
4 would be no basis for applying a different limitation of
5 liability other than the one the cargo owner entered into
6 in that contract with the non-vessel-operating carrier.
7 And that's clear from Professor Ramberg's treatise on the
8 law of freight forwarding, his amicus brief which sets
9 this out clearly --

10 JUSTICE BREYER: Britain does it differently
11 though, I take it.

12 MR. FREDERICK: I beg your pardon?

13 JUSTICE BREYER: Britain does it differently
14 in --

15 MR. FREDERICK: No. Britain -- well, Britain
16 does it differently to this extent. Britain applies a
17 concept called bailment on terms, which again Norfolk has
18 introduced as a totally new theory in their reply brief on
19 the merits. But they misapply the bailment on terms
20 argument. The bailment on terms concept applies when the
21 bailee, the carrier, is having control of the goods and
22 damages those goods, and there's a suit brought against
23 that carrier, and he says, I get to carry it on my terms.
24 There's no concept in the law of bailment for a sub-bailee
25 to say, well, I don't like my terms. I want to use a

1 different carrier's terms.

2 And that's what Norfolk Southern is arguing
3 here. They don't want to apply their terms of carriage
4 because their terms of carriage provide a \$250,000 per
5 container limit, which would more than amply satisfy the
6 damage caused to Kirby's goods. They want to rely on a
7 different bailee's terms. And they cite no case and there
8 is none that we're aware of that applies the bailment on
9 terms concept in that way.

10 JUSTICE KENNEDY: Are there cases where the
11 owner of the goods sues the forwarder for making
12 improvident contracts for -- for shipping it with
13 liability limits that are too low?

14 MR. FREDERICK: Only when the forwarder was the
15 agent of the owner. The cases that I'm familiar with have
16 been thrown out where the forwarder was in fact a carrier
17 and therefore had --

18 JUSTICE KENNEDY: No, but I don't --

19 MR. FREDERICK: -- no fiduciary duty.

20 JUSTICE KENNEDY: -- I don't know that -- that
21 answer would help you because then you -- you would say
22 that the -- under -- under your view that the cargo owner
23 simply has -- has no recourse whatever against whatever
24 the forwarder does. The forwarder --

25 MR. FREDERICK: If you were to conclude, Justice

1 Kennedy, in this case that ICC is the sort of quasi-agent,
2 whatever their -- however you want to characterize
3 Norfolk's theory here, that wouldn't be applicable in
4 Australia, which would apply its own precedents to say,
5 no, it isn't. It's a carrier. And as a carrier, it owes
6 no fiduciary duty and cannot bind Kirby because Kirby did
7 not consent to be bound by the terms.

8 JUSTICE BREYER: Well, you'd have to say -- I
9 mean, you'd have to say that Northern case rests on the
10 principle that the agent -- he's not an agent for most
11 purposes, but he is an agent for the purpose of -- of
12 entering into a liability limitation. And that's not
13 unheard of in the law. It -- it's an agency type power
14 that's given to a person who isn't an agent. And the
15 argument would be, well, that's the precedent here.

16 MR. FREDERICK: I would like to address the
17 O'Connor case because I think that has been badly
18 misunderstood and represented by the other side in this
19 case.

20 We went back and looked at the trial record, and
21 in the trial record, one of the instructions to the jury
22 stipulated that the freight forwarder was the owner's
23 agent. As a matter of fact, the forwarder was Mrs.
24 O'Connor's agent in that case, and the case proceeded all
25 the way up on the assumption that as a matter of fact the

1 forwarder was serving as the agent.

2 Now, our submission is simple. You can't read
3 that and say that that announces some common law rule when
4 the jury is being stipulated and both sides agree that
5 Boyd is her agent.

6 JUSTICE SOUTER: Did this Court know that?

7 MR. FREDERICK: We believe that the fair way to
8 read Mrs. O'Connor's brief in the case -- and we cite it
9 in our -- our brief -- is that yes, it did. The -- the
10 Minnesota Supreme Court opinion in that case said the
11 instructions were not objected to. It is clear Mrs. --
12 Boyd is O'Connor's agent, and we think it is the case --

13 JUSTICE SOUTER: Yes, but that -- I mean, that's
14 ambiguous on -- on the point, isn't it?

15 MR. FREDERICK: I don't think so, Justice
16 Souter.

17 JUSTICE SOUTER: I mean, it -- it may be that
18 it's clear because it was clear as -- as -- on the basis
19 of some legal principle. It may be clear because -- I'm
20 not quite sure what this means, but because they said as a
21 matter of fact, there's an agency relationship. But this
22 -- this Court doesn't know that. The -- the Minnesota
23 opinion is ambiguous on that.

24 MR. FREDERICK: No. Justice Souter, the jury
25 charge is in the Supreme Court record.

1 JUSTICE SOUTER: Oh, it is. Okay.

2 MR. FREDERICK: That's where we found it. And
3 -- and even if you were to assume that there was something
4 else different, the Interstate Commerce Act passed filed
5 tariff requirements that under the act, as a statutory
6 matter, the cargo owner was assumed to understand, and
7 that's how the railroad law developed.

8 Now, the Government makes the leap that because
9 O'Connor did that in the rail context, the same answer has
10 to apply here in the Shipping Act context, but that is
11 completely flawed. They give you some of the statutory
12 provisions in an appendix to their supplemental brief, but
13 they leave out the most important one. And that is the
14 provision that says, if a vessel carrier enters into a
15 service contract, it can be done confidentially and would
16 not be subject to the normal tariff requirements.

17 CHIEF JUSTICE REHNQUIST: This is the Shipping
18 Act you're talking about?

19 MR. FREDERICK: Yes. I'm talking about the
20 Shipping Act, and the provision is 1707(c)(1).

21 JUSTICE STEVENS: May I ask a question?

22 JUSTICE BREYER: Why, if that's right -- let --
23 just why -- as a simple, empirical question, if -- if this
24 is so, you know, fairly clear, he's not an agent,
25 independent, you can't enforce the liability thing, why

1 aren't the case books filled or the -- the reports filled
2 with cases where an insurer went -- and it subrogated,
3 went and sued somebody down the line and they asserted a
4 liability limitation and people laughed and said it's not
5 -- you can't assert that, he never entered into a contract
6 with you? Why isn't that true in all these eight foreign
7 countries?

8 MR. FREDERICK: The --

9 JUSTICE BREYER: Why can't we find those cases?

10 MR. FREDERICK: The proposition has been so
11 clear that no one has had the audacity to argue it for a
12 railroad.

13 (Laughter.)

14 JUSTICE BREYER: Well, fine. I'm sorry. We would
15 find in insurance records, for example -- insurance companies
16 -- they're proud of the money they get back. It would
17 be easy to locate lots of instances where insurance companies
18 did recover, subrogated, from carriers down the line
19 who were unable to assert liability limitations.

20 MR. FREDERICK: Justice Breyer, I don't want to
21 create work for your law clerks, but if you did a -- a
22 search for Himalaya clause, your law clerk will find 400
23 cases decided since the Robert C. Herd decision, most of
24 which will have been brought by insurance companies. And
25 the reason is that the insurance companies are bringing

1 this against non-maritime parties. It's long been
2 understood that Himalaya clauses are intended to protect
3 only maritime parties. There is no reported court of
4 appeals decision --

5 JUSTICE STEVENS: May I ask a question referring
6 to the -- the matter you quoted a moment ago? After the
7 shipment arrives in the -- on shore and there is an
8 outstanding maritime bill of lading that has the COGSA
9 limits in it, is the railroad entitled to rely on that
10 bill of lading in quoting a rate to the maritime shipper?

11 MR. FREDERICK: I'm glad you asked that question
12 of me, Justice Stevens, because it -- it may but that
13 isn't what happens. Their own rail circular has no
14 mention of ocean bills of lading. Their own rail circular
15 says we -- you accept our terms and you do it on the basis
16 of our rates. And their rates for damage at --

17 JUSTICE STEVENS: But what you're saying, if I
18 understand it, they did not do so in this case.

19 MR. FREDERICK: And there's no --

20 JUSTICE STEVENS: But would it be open to them,
21 as a matter of law, to say, whenever we get a joint bill
22 of lading like this, we're going to give a different rate
23 because we have a different liability exposure?

24 MR. FREDERICK: They certainly have contractual
25 freedom to alter their relations in the future.

1 JUSTICE STEVENS: But -- but in doing that, can
2 they rely on the limits in the joint bill of lading?

3 MR. FREDERICK: They don't do that and they
4 haven't done that. And we found no evidence of industry
5 practice that, in fact, they do do that. In fact, the
6 best evidence of that, Justice --

7 JUSTICE STEVENS: But you're asking us to hold
8 that they may not do that.

9 MR. FREDERICK: No. Our position is that they
10 have to come forward with some indication that in fact
11 that's what they did, and they haven't done that. And
12 there's no reason to think that they did because they
13 contracted with a different party.

14 JUSTICE GINSBURG: Mr. Frederick, you -- you --

15 JUSTICE STEVENS: But if they did, would there
16 be a different result in the case?

17 MR. FREDERICK: I don't think so, and the reason
18 is that each of these carriers in their own subcontracts
19 are having a contractual relation with the party with whom
20 they deal. And if that means that if that party wanted to
21 break through the limit, they would be bound by the
22 contract. That wouldn't necessarily mean that an upstream
23 harmed party would be bound by it. That's the Herd case.

24 I mean, in Herd, it's very important that you
25 understand the very last paragraph of the Court's opinion

1 because the Court there relied on an Australian High Court
2 opinion in which it said -- and if I could just substitute
3 the parties and read -- Hamburg Sud was engaged by ICC and
4 by nobody else. ICC had no authority whatever to bind
5 Kirby by contract with Hamburg Sud, and no principle of
6 law compels the inference of any contract between Kirby
7 and Hamburg Sud. That's the very last paragraph of this
8 Court's decision in Herd as understood through the lens of
9 what our -- our case is here.

10 So, Your Honor, I think that the -- the point is
11 contractual privity would determine the relationships
12 between the parties with whom there's a contract, and
13 where there isn't contractual privity, if they are not a
14 third party beneficiary of the contract, they would be
15 liable for full damages, as the stevedore was in the Herd
16 case.

17 JUSTICE SOUTER: I -- I thought you -- clarify
18 this for me. I thought you were saying a moment ago they
19 would have to be a third party beneficiary and they would
20 have, in fact, to have relied upon the -- the limitation
21 upstream. Is that correct?

22 MR. FREDERICK: Well, I don't think that -- I
23 don't think reliance necessarily has to be -- establishes
24 a legal requirement. All I'm saying is that there is no
25 reliance in this case and there's no reliance in the

1 industry that I'm aware of --

2 JUSTICE SOUTER: But that's -- that's --

3 basically to your essential argument, that's neither here
4 nor there.

5 MR. FREDERICK: That's right. The question is
6 are they a third party beneficiary. And Norfolk Southern
7 clearly is not.

8 JUSTICE GINSBURG: What -- what does govern
9 their liability in your view? You referred to this
10 circular a couple of times. That's not a tariff. Is --
11 is your position they were negligent and whatever the
12 damages you proved?

13 MR. FREDERICK: Yes. That's the hold of the
14 Herd case. The stevedore was not allowed to claim the
15 limits of the ocean carrier and was liable for the full
16 tort.

17 JUSTICE GINSBURG: So what does the -- what does
18 the circular have to do with anything?

19 MR. FREDERICK: That -- could I answer this
20 question, Justice -- Mr. Chief Justice?

21 CHIEF JUSTICE REHNQUIST: Briefly.

22 MR. FREDERICK: It would be going to a bailment
23 on terms argument. If you were to find that Norfolk
24 Southern is entitled to rely on its own terms as a bailee,
25 their rail circular would govern. Our position is we get

1 full damages under that too.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
3 Frederick.

4 Mr. Phillips, you have 3 minutes remaining.

5 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS
6 ON BEHALF OF THE PETITIONER

7 MR. PHILLIPS: Thank you, Mr. Chief Justice.

8 Let me start by trying to clarify the Herd
9 holding. Herd did not involve the Himalaya clause since
10 there was no question about downstream liability or the
11 limits on liability, and so what the Court said there is
12 if your agreement extends to carriers, it doesn't extend
13 on to stevedores. Our agreements extend well beyond
14 carriers under these circumstances, and we're asking to
15 have them applied in this particular context.

16 Justice Stevens, with respect to your question
17 about the rate flexibility that we had. There is no
18 question that the protections of the Hamburg Sud bill,
19 which we -- which we accepted for these purposes, carries
20 with it rates that we -- there are limitations on
21 liability that Norfolk Southern was intimately familiar
22 with, relied upon in setting the rate. You could -- you
23 could have assumed that based on the Court's analysis in
24 Great Northern, but the reality is that, of course,
25 entities that engage in these kinds of operations and the

1 kind of common enterprises know what their rates are and
2 they set the rates. And if you had broken this rate --
3 this transportation down, it would have required a
4 different rate setting regime, and the -- and the
5 circumstances would have been fundamentally different.
6 The basic point here is that there is a reliance and
7 interest that is implicated here.

8 Mr. Frederick, with all due respect, has
9 described to you a world that is not the world in which
10 ocean -- ocean carriers and rail carriers and shippers
11 ordinarily operate. The world in which we operate is one
12 in which we say either declare the value of the goods or
13 live with the limitation on liability. They never
14 declared any value of the goods. There's no way for the
15 freight forwarder to declare the value if the shipper
16 doesn't do that in the first instance. And all of the
17 limits of liability flow directly from that.

18 It's not unfair. It doesn't unduly limit the
19 remedies available for the owner of the goods. He always
20 has the opportunity to take advantage of the option of
21 declaring the goods, making us the insurer under those
22 circumstances, and we never do it.

23 The fact that there are no such cases, Justice
24 Breyer, strikes me as the clearest evidence that the rule
25 of law, as we've described it in our briefs and as our

1 amicus have described it, is the standard that has applied
2 to the worldwide carriage.

3 One -- two last points. Justice Breyer, you
4 asked me for a couple of theories about how to get to the
5 right answer. One other theory is the entrustment of the
6 goods creates an implied consent to be bound. That's a --
7 an argument that's been made.

8 And then finally, Mr. Chief Justice, you asked
9 about the diversity jurisdiction. Acme Fast Freight is a
10 post-Erie case, along with Great Northern is itself
11 obviously a decision that comes out of the Minnesota
12 Supreme Court.

13 And then finally, with respect to Great
14 Northern, I would urge the Justices to read the brief.
15 It's absolutely clear.

16 Thank you, Your Honor.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
18 Phillips.

19 The case is submitted.

20 (Whereupon, at 11:03 a.m., the case in the
21 above-entitled matter was submitted.)

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